

COURT  
AS U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
APR - 7 2004  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

**XXXXXXXXXXXXXXXXXXXXXXXXXXXX**

NO. 4:04-CV-145-A

This is an appeal from final order entered September 2, 2003, granting appellee's motion for summary judgment in an adversary proceeding. This court's jurisdiction exists pursuant to 28 U.S.C. § 158(a).

## II.

### Underlying Proceedings

The marriage of appellant and appellee was terminated by final decree of divorce entered October 7, 1999. Appellee was granted custody of the parties' two children and appellant was ordered to pay child support and to reimburse appellee for half of the medical bills incurred by the children for which insurance coverage was not available. Shortly thereafter, appellant filed a suit affecting parent/child relationship in an attempt to modify the custody granted in the final decree of divorce. In a final order completing that case, entered on or about March 6, 2002, appellant was ordered to pay to appellee attorneys' fees in the amount of \$49,000.00, plus interest at the rate of 10% per annum. In that regard, the judgment stated:

IT IS ORDERED that good cause exists to award Eldon Prax attorneys' fees to be paid by Jacqueline L. Sonntag. THEREFORE IT IS ORDERED THAT Eldon Prax is awarded a judgment in the sum of \$49,000.00 against Jacqueline L. Sonntag, with interest at 10 percent per year compounded annually from the date the judgment is signed until paid. The judgment for which let execution issue.

Tr. at 76.

On June 13, 2002, appellant filed her voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Appellee objected to the exemptions claimed by appellant and, on November 5, 2002, filed an adversary proceeding seeking a declaratory judgment that appellant's obligations to pay child support, medical costs, and the attorneys' fees awarded in the suit affecting parent/child relationship were nondischargeable

under 11 U.S.C. § 523(a)(5). In her response to the complaint, appellant admitted that the child support and medical reimbursement payments were nondischargeable. She denied that the claim for attorneys' fees and interest was nondischargeable. On March 3, 2003, appellee filed a motion for summary judgment to which appellant responded.<sup>1</sup> On June 18, 2003, the bankruptcy court heard arguments on the motion, which was granted by order signed September 2, 2003. Appellant appeals.

### III.

#### Issue on Appeal

The sole issue presented on appeal is whether debtor's obligation to pay the attorneys' fees and interest thereon awarded to appellee is nondischargeable under 11 U.S.C. § 523(a)(5).

### IV.

#### Standard of Review

As this is an appeal from a summary judgment, the court reviews the bankruptcy court's factual findings for clear error and its legal conclusions and mixed questions of fact and law de novo. In re Carney, 258 F.3d 415, 418 (5th Cir. 2001); In re Mercer, 246 F.3d 391, 402 (5th Cir. 2001). The standard for granting summary judgment in an adversary proceeding is the same as under Rule 56 of the Federal Rules of Civil Procedure. Bankr. R. 7056. Summary judgment is appropriate if, in viewing the

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<sup>1</sup> Appellant's response was apparently docketed under the main case instead of the adversary proceeding. Nevertheless, the bankruptcy judge considered it. Tr. at 116.

evidence in the light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Id. at 256. Once the moving party has carried its burden under Fed. R. Civ. P. 56(c), the nonmoving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. Id. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

V.

#### Discussion<sup>2</sup>

Title 11, § 523(a)(5) excepts from discharge any debt owed to "a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . ." The United States Court of Appeals for the Fifth Circuit has interpreted § 523(a)(5) to

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<sup>2</sup> The bankruptcy court did not make any fact findings. The court reviews its legal conclusions de novo. In re Carney, 258 F.3d 415, 418 (5th Cir. 2001).

include court-ordered payment of attorneys' fees incurred in post-divorce/child custody litigation. Hudson v. Raggio & Raggio, Inc. (In re Hudson), 107 F.3d 355, 357 (5th Cir. 1997); Dvorak v. Carlson (In re Dvorak), 986 F.2d 940, 941 (5th Cir. 1993). The Fifth Circuit has not allowed, much less alluded to, any exception to its strict interpretation of the statute.

Appellant argues that the court should follow the reasoning of the Tenth Circuit in Lowther v. Lowther (In re Lowther), 321 F.3d 946 (10th Cir. 2002), affirming, 266 B.R. 753 (B.A.P. 10th Cir. 2001). There, the Tenth Circuit determined that an exception to the general rule of nondischargeability exists in "unusual circumstances." 321 F.3d at 949. There, unusual circumstances were found to exist based on the bankruptcy court's fact findings that payment of court-ordered attorney's fees "would essentially negate the support payments awarded by the state court [to the debtor] for at least five years and would clearly affect her ability to financially support the child." Id. The court is not persuaded that the Fifth Circuit, having spoken so plainly in Dvorak and Hudson, would follow the Tenth Circuit. Even if it did, appellant has not raised a genuine issue of material fact to show that the declaration of nondischargeability would severely impair her ability to support the very children whom § 523(a)(5) was designed to protect. Appellant did not request the bankruptcy court to make any fact findings and the record would not support the kind of findings necessary to meet the Tenth Circuit's test in any event.

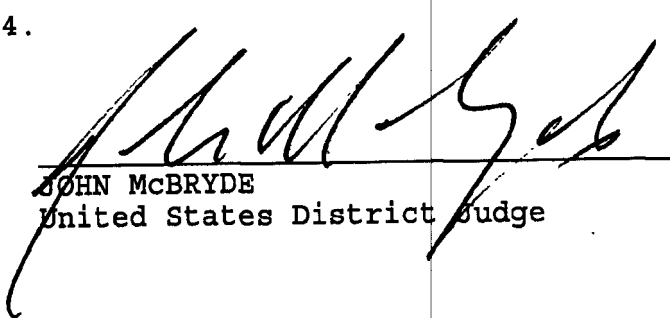
VI.

Order

For the reasons discussed herein,

The court ORDERS that the September 2, 2003, order of the United States Bankruptcy Court declaring the obligations of appellant, Jacqueline Lee Sonntag, to pay child support, unreimbursed medical expenses, and attorneys' fees and interest to be nondischargeable under 11 U.S.C. § 523(a)(5) be, and is hereby, affirmed.

SIGNED April 1, 2004.



JOHN MCBRYDE  
United States District Judge